

MEMO ENDORSED

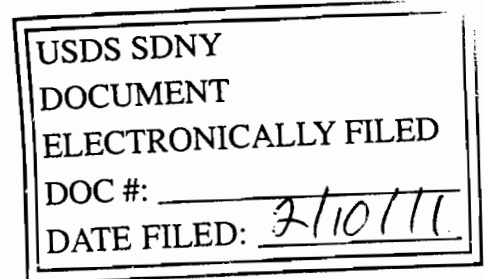
FROSS ZELNICK LEHRMAN & ZISSU, P.C.

Michael Chiappetta
212.813.5963
mc@fzlj.com

February 9, 2011

BY EMAIL

The Honorable Richard J. Sullivan, U.S.D.J.
United States District Court
Southern District of New York
500 Pearl Street, Room 640
New York, New York 10007
sullivanysdchambers@nysd.uscourts.gov



Re: *Kilter Industries, Inc. v. Avon Products, Inc., et al.* - Case No. 09-cv-3490
(RJS)(MHD) (Out Ref. AVO USA TC 0701831)

Dear Judge Sullivan:

The undersigned counsel for the parties submit this joint letter to the court to request permission to complete one party deposition and conduct one third party deposition outside of the fact discovery period, which closes on February 14, 2011. This request, if granted, would not affect any of the deadlines in the case.

Nature of Action

Kilter is an advertising agency and Avon is a marketer of various beauty and cosmetic products. As the Court may recall, the case began in March of 2009. Plaintiff Kilter's Amended Complaint alleged that defendant Avon and its former executive Peter Waxman have engaged in copyright infringements in Avon's November 2007 launch and marketing thereafter of certain "Liiv" branded beauty products and that Avon breached an oral agreement to provide Kilter with 6-8 months of work arising out of a late 2005 / early 2006 competitive pitch process. Kilter has also pleaded claims for quantum meruit and unjust enrichment as well as various state law causes. Defendants have denied these claims and asserted affirmative defenses. On August 20, 2010, the Court denied defendants' motion pursuant to Rule 12(b)(6) to dismiss the First Amended Complaint.

Status of Discovery

On January 20-21, 2011, defendants Avon Industries, Inc. ("Avon") and Peter Waxman completed the deposition of plaintiff Kilter Industries, Inc. ("Kilter") and its officer Cynthia Knox. On January 27-28, 2011, Kilter commenced the depositions of defendants Avon and Mr.

{F0748493.1}

866 United Nations Plaza at First Avenue & 48th Street | New York, New York 10017
Phone 212.813.5900 | Fax 212.813.5901 | www.frosszelnick.com

The Honorable Richard J. Sullivan
February 9, 2011
Page 2

Waxman by deposing Mr. Waxman (pursuant to notice as an individual and as a Rule 30(b)(6) designee on behalf of Avon) and three other Avon designees. Kilter is also scheduled to take the deposition of one final Avon designee on February 10, 2011. Except for any necessary supplementation, both sides intend to complete their responses to all written discovery by the close of fact discovery.

Continued Deposition of Defendant Peter Waxman

Defendant Waxman left Avon's employ in March 2007 and within the last month began a new job. On January 27, 2011, he was present for deposition from 8am to 5pm and gave 7 hours of testimony during that time. Because Kilter did not complete its questioning of Mr. Waxman, the parties agreed to leave Mr. Waxman's deposition open and to have him return to complete his deposition the following week. The parties scheduled Mr. Waxman's deposition to resume on February 2, 2011, the last date when he was available before the February 14, 2011 close of fact discovery due to a previously scheduled extended trip (that is primarily for business purposes). However, due to a dispute concerning the duration and scope of the resumed deposition, the parties did not resume the deposition on that date.¹ Because Mr. Waxman is not scheduled to be in New York for more than one day until the first week of March, he is not available for the now-agreed 3 hours of direct examination, and then cross-examination and re-direct examination, on any alternative date during the discovery period.

Mr. Waxman has stated he is available to resume his deposition on March 10, 2011, and the parties respectfully request that the Court permit said deposition to resume on this date after the close of fact discovery.

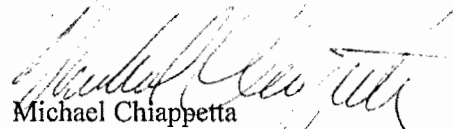
Third Party Deposition of Ryan iDirect

On January 15, 2010, Kilter served a subpoena on third party Ryan iDirect ("Ryan") seeking documents and deposition testimony. When Ryan raised some confidentiality concerns, Kilter agreed to take Ryan's deposition off calendar so that the parties could address those concerns. The parties recently entered into a confidentiality agreement with Ryan and Ryan produced documents pursuant to the subpoena (which had been served more than a year ago). However, Kilter did not reschedule Ryan's deposition. Because Avon still wished to depose Ryan, particularly with respect to its recently-produced documents, on February 4, 2011, Avon served its own subpoena on Ryan scheduling its deposition for February 14, 2011. Ryan's counsel has advised that his client is not available on February 14, 2011, but that it is available during the periods February 15-17, 2011 and February 23-23, 2011. The parties respectfully request that the Court permit the deposition of Ryan to go forward on one of these dates after the close of fact discovery.

¹ Although the parties have resolved their dispute regarding the duration of Mr. Waxman's resumed deposition, and agreed to contact the Court jointly via this letter to ensure the Court does not object to the resumed deposition after the formal end of fact discovery, they still dispute the propriety of one particular line of questioning. Avon intends to pursue a motion for a protective order with respect to this issue and the parties will submit a pre-motion letter in this regard before the close of discovery.

The Honorable Richard J. Sullivan
February 9, 2011
Page 3

Respectfully yours,



Michael Chiappetta
Counsel for Defendants

Submitted with the consent of:



Matthew A. Kaplan
Counsel for Plaintiff


cc: Roger L. Zissu, Esq.
Matthew A. Kaplan (counsel for plaintiff) (by e-mail)
Toby M. J. Butterfield, Esq. (counsel for plaintiff) (by e-mail)

The requests are granted. The depositions of Peter Waxman and Ryan iDirect may take place outside of the fact discovery period. The other deadlines in this case remain unchanged.

SO ORDERED

Dated:

2/9/11



RICHARD J. SULLIVAN
U.S.D.J.